RECORD AND BRIEFS

No. 16-1161

In The Supreme Court of the United States

Supreme Court, U.S.
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BEVERLY R. GILL, ET AL.,
Appellants,

v.

WILLIAM WHITFORD, ET AL.,
Appellees.

On Appeal from the
United States District Court
for the Western District of Wisconsin

BRIEF OF *AMICI CURIAE* THE REPUBLICAN NATIONAL COMMITTEE AND THE NATIONAL REPUBLICAN CONGRESSIONAL COMMITTEE IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF THE AMICI CURIAE

The National Republican Congressional Committee ("NRCC") is the principal national political party committee focused on electing Republican candidates to the United States House of Representatives. Members of the NRCC include all incumbent Republican House Members. A Chairman and the Executive Committee, composed of the Republican House Members, govern the NRCC.[1] Most of the NRCC's Members—excluding only those from states with only one congressional district—each represent a single congressional district whose boundaries are re-established after each decennial census.

The Republican National Committee ("RNC") is the national political organization of the Republican Party of the United States. From supporting candidates and party organizations, to building and enhancing election data, to sponsoring voter registration, and turnout programs, the RNC is involved in a wide range of party-building activities. The RNC supports candidates nationwide for a myriad of federal, state and local offices.

Consequently, a ruling from this Court will directly impact both amici.

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[1] No party's counsel authored any part of this brief. No person other than the amici curiae made a monetary contribution intended to fund the preparation or submission of this brief. On April 17, 2017 and April 18, 2017, counsel for Appellants and Appellees, respectively, provided written consent to the filing of this brief.

SUMMARY OF THE ARGUMENT

Appellees' proposed test purports to discover what has eluded courts for decades: a judicially manageable standard to determine unconstitutional partisan gerrymanders. But Appellees' Proposed Standard, which relies inexorably on the "Efficiency Gap," is materially deficient.

First, the reality of political geography undercuts the "efficiency gap" theory. Some voters who support one party are naturally "packed" as a result of residential patterns not connected to legislative choices. Under Appellees' "efficiency gap" theory, the votes of these geographically packed voters are classified as "wasted" votes. This Court's prior precedents and amici reject the notion that votes that fail to elect, or are in excess of the amount necessary to elect, are wasted.

Furthermore, significant social science literature illustrates how the reality of political geography makes it more difficult to draw significant numbers of compact and contiguous competitive districts of equal population, particularly as the size of the legislative body increases.

Second, the "efficiency gap" is actually a partisan solution to the perceived problem of many Democratic Party voters living in highly concentrated areas. Adopting any constitutional standard that depends on the "efficiency gap" will result in requiring the same bizarrely shaped districts that this Court has rejected in racial gerrymandering cases.

Third, the foundational premise of the "efficiency gap" is that it compares the number of seats in a legislature with the number of statewide votes. JA270a. But the Constitution contains no right to proportional representation in legislative bodies based on statewide vote totals. This Court should therefore reject Appellees' proposed test.

ARGUMENT

I. The "Efficiency Gap" Cannot Be A Component Of A Judicially Manageable Standard Because It Measures Political Geography.

The "efficiency gap" ("EG") standard is not the work of professional mathematicians, statisticians, or political geographers. Rather, it is a calculation created by two law school professors who published the EG theory in the University of Chicago Law Review. The EG was not subjected to scientific peer review, nor any other rigorous scientific review, because the EG does not describe any objectively observable phenomena. Rather, the EG serves to justify its proponents' view of how districts *should* be drawn in light of their entirely subjective judgment that certain votes are "wasted" unless properly distributed.[2] Appellees ask this Court to adopt this

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[2] Labeling any vote as a "wasted" vote is anathema to any conception of a representative form of government. It is beyond the scope of this brief to address this concept other than to note that no vote should ever be considered by the courts or by the people as "wasted." Every vote

proposal as an indispensable piece of a judicially manageable standard.

The proposed standard treats the following votes as "wasted": (1) every vote for a losing candidate and (2) every vote not needed to secure a victory (in a two party race this equates to anything in excess of 50% of the votes plus one). The EG is then calculated by dividing the "wasted" votes for each party in an election by the overall votes cast in that election.[3] The percentage difference at the end of this equation is the EG. Any EG above 7%, according to Appellees' expert, will continue to favor the party it benefits for the life of the plan. JA163a. Furthermore, according to Appellees' expert, this "favoritism" will work to lock out a party from holding a majority in the legislative body even if there is a huge swing in statewide vote share. JA163a-64a.

According to the creators of the EG, the EG "aggregates all of a district plan's cracking and packing *choices* into a single tidy number." Nicholas Stephanopoulos & Eric McGee, *Partisan Gerrymandering and the Efficiency Gap*, U. Chi. L. Rev. 831, 834 (2015) (emphasis added). By the admission of the Appellees' own expert, as well as the majority below, Wisconsin experiences a natural

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and every voter in every precinct plays a vital role in our system of government.

[3] The mathematical formula can be expressed in the following way, $EG = Wb/n - Wa/n$, where W = "wasted" votes, b and a = individual political parties, and n = total number of votes in the election. JA160a n. 276.

"packing" effect due to the high concentration of Democratic voters in Milwaukee and Dane Counties. JA200a-01a. Yet, the authors of the EG already assume that any "packing" and "cracking" that has occurred is the *choice* of the legislature. This is an assumption that proves fatal. Attributing all geographical inefficiencies to partisan intent contradicts the overwhelming weight of the evidence. *See* Nicholas Goedert, *Gerrymandering or Geography? How Democrats Won the Popular Vote but Lost the Congress in 2012*, Res. & Pol., Apr. 8, 2014, at 1 (hereinafter Goedert, *Gerrymandering or Geography*); Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. of Pol. Sci. 239, 241 (2013) (hereinafter Chen, *Unintentional Gerrymandering*).

The majority noted this "packing" effect in Wisconsin, writing, "Wisconsin's political geography affords Republicans a modest natural advantage in districting." JA200a. The Appellees acknowledge a natural packing effect. JA101-102 ("[Appellees']... counsel stated that 'there likely is some natural packing' of Democratic voters, 'especially of minority voters in places like Milwaukee.'"). This Court has even recognized that a "natural packing effect" can, and does, occur. *See Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) ("[P]olitical groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a 'natural' packing effect."); *see id.* at 309 (Kennedy, J., concurring) (citing a study on political geography stating that "[c]ompactness standards help

Republicans because Democrats are more likely to live in high density regions.").

At present, this natural "packing" effect is largely unique to Democrats. *See* Chen, *Unintentional Gerrymandering*, 8 Q.J. of Pol. Sci. 239, 245 ("The complex process of migration, sorting, and residential segregation... has left the Democrats with a more geographically concentrated support base than Republicans."). As a result, the unavoidable consequence of adopting the EG as a constitutional standard will be to benefit one political party (the Democrats) at the expense of another (the Republicans) and require maps to comply with the EG's mathematical requirements rather than traditional districting principles. Adopting the EG as a judicially manageable standard means introducing more partisanship into the redistricting process, not less. [4] Attributing intent to natural differences in political geography by using the EG will compel legislatures to "pack" and "crack" their states' own natural political geography to achieve a smaller EG. This position is untenable because it places the Court in the position of picking political winners and losers. *See Vieth*, 541 U.S. at 308-09 (Kennedy, J., concurring) (noting that under the plaintiffs' proposed standard, a court applying the "fairness principle" would "unavoidably have significant political effect, whether intended or not . . .we could not assure the parties that this

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[4] The same applies to the majority's contention that the EG be used as "corroborative evidence" of discriminatory intent and effect, and not as part of a judicially manageable standard per se. JA176a.

criterion . . .would not in fact benefit one political party over another.").

Democratic voters are more likely to be packed into compact and homogenous areas not only in Wisconsin, but also in most of the rest of the United States. *See* Malia Jones & Kristian Knutsen, *The Political Geography of Wisconsin: Partisanship and Population Density*, *WisCONTEXT (Nov. 7, 2016, 7:05 PM), http://www.wiscontext.org/political-geography-wisconsin-partisanship-and-population-density* (hereinafter Jones, *The Political Geography of Wisconsin*); Chen, *Unintentional Gerrymandering*, 8 Q.J. of Pol. Sci. at 239. In light of this general trend, which results in an "inefficient" concentration of Democratic votes in densely populated areas, the EG is a tool that advances the partisan interests of the Democratic Party.[5] Appellees would have the Court enshrine this partisan interest in the Constitution.

Furthermore, the EG calculation is itself extremely sensitive to small changes in voter turnout. *See Whitford v. Nichol*, 180 F. Supp. 3d 583, No. 15-421 (W.D. Wis. Jan. 5, 2016) (Decl. of Trende, ¶ 148) (Dkt. No .55). This Court recognized a fundamental truth about winner-take-all elections when it observed that, "even a narrow statewide preference for either party would [under a scenario where the party vote is 45% to 55%] produce an

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[5] This is not uniform throughout the United States and is "less pronounced or absent in less industrialized states . . . and in relatively sparse Western states." Chen, *Unintentional Gerrymandering*, 8 Q.J. of Pol. Sci. at 242.

overwhelming majority for the wining party..." *Bandemer*, 478 U.S. at 130. A 5% swing in voter preference is not large or unusual. Therefore, even in districts designed to be "tossups," a 5% swing could result in a large EG that, under Appellees' vision, would invite constitutional scrutiny. *See* JA301a-03a. The natural packing of Democratic voters only serves to enhance this phenomenon. JA301a ("[Due to Democrat's natural packing] Democratic losses *and* wins both produce massive numbers in wasted votes."). Aside from its apparently partisan purposes and/or effects, the EG is too sensitive to voter fluctuations to be a reliable tool for this Court, or any other, to rely upon. *See* JA153 ("[T]he EG metric is sensitive enough that relatively small differences in the electoral outcome can make a difference between whether a map is presumptively constitutional or not.").

A. Social Science Research Confirms That The Geographic Distribution Of Republican And Democratic Voters Results In More Republican Seats Irrespective Of Partisan Gerrymandering.

Geographers have long noted that Democrats and Republicans are distributed unevenly in the United States. *See* Goedert, *Gerrymandering or Geography*, Res. & Pol. at 1; Chen, *Unintentional Gerrymandering*, 8 Q.J. of Pol. Sci. at 240; *see generally* Robert Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in*

Congressional Elections, 66 Am. Pol. Sci. Rev. 1234 (1972) (hereinafter Erikson, *Malapportionment*).

It is well-known to researchers and the courts that voters who support Democrats are often tightly clustered in cities, while Republicans are more evenly distributed outside of urban areas. Chen, *Unintentional Gerrymandering*, 8 Q.J. of Pol. Sci. at 242-43; *see also* Jowei Chen & David Cottrell, *Evaluating Partisan Gains from Congressional Gerrymandering: Using Computer Simulations to Estimate the Effect of Gerrymandering in the U.S. House*, 44 Electoral Stud. 329, 333 (2016) (hereinafter Chen, *Evaluating Partisan Gains*); JA200a-01a; *Vieth*, 541 U.S. at 290. This clustering has occurred since at least the 1950's. *See* Erikson, *Malapportionment*, 66 Am. Pol. Sci. Rev. 1234, 1242-44. Figure 1 is an example of this phenomenon in Wisconsin.

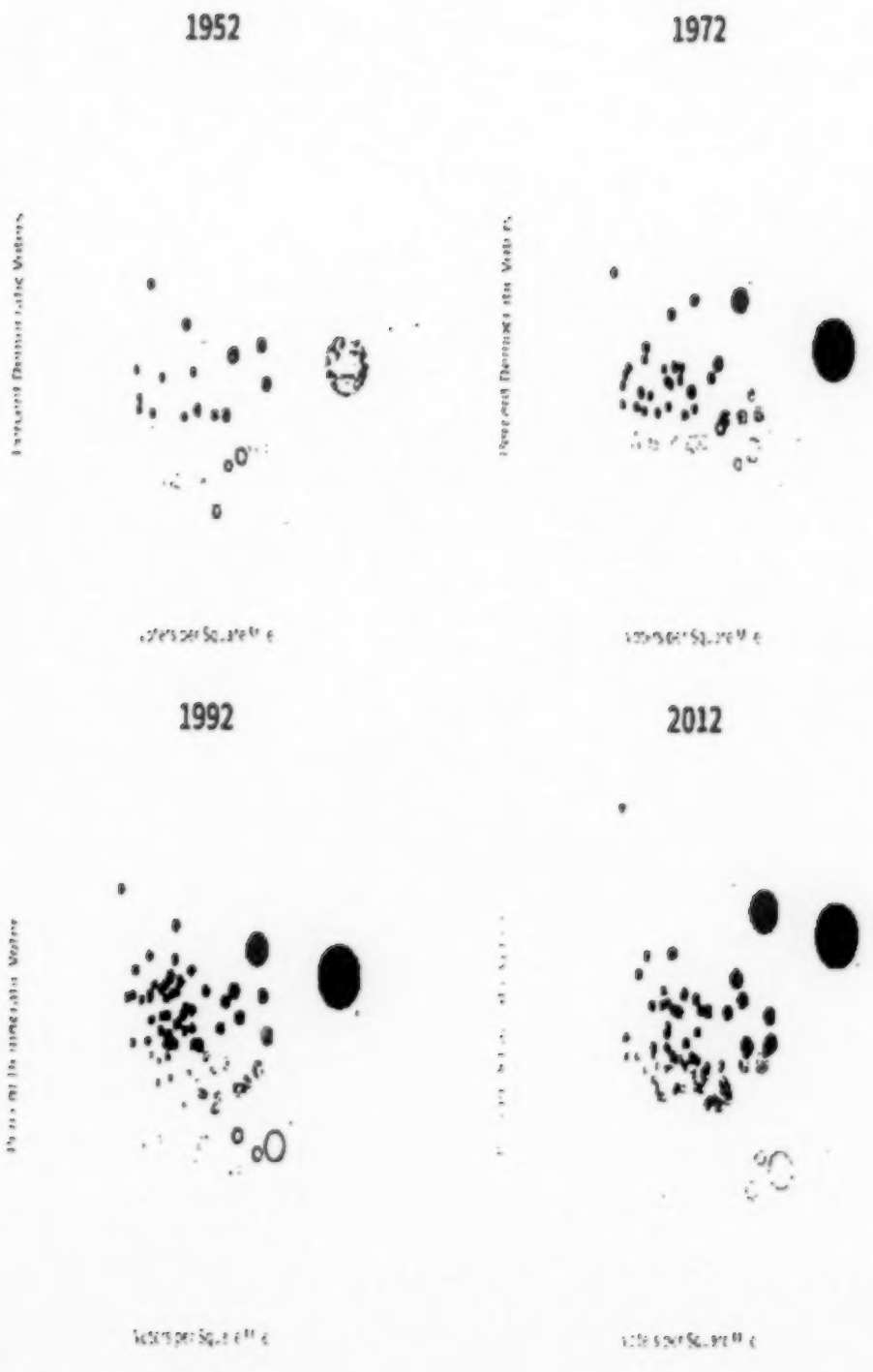

Figure 1: Jones, *The Political Geography of Wisconsin*, *supra* at 7.

The voters in the two most populated counties have become increasingly Democratic (as shown by movement up the graph in Figure 1) while the voters of the majority of small and medium-sized counties remain fairly evenly distributed in terms of political affiliation. This phenomenon has been observed in other states, including Florida. Chen, *Unintentional Gerrymandering*, 8 Q.J. of Pol. Sci. at 246 fig.3; *see infra* Figure 2. One need only look at the visual representation of the Democratic "peaks" in Figure 2 to understand the extent of this clustering effect. The clustering of Democratic voters in compact urban areas has the natural—and unintended—outcome of creating more Republican districts when using the traditional redistricting criteria of equal population, compactness and contiguity. Chen, *Unintentional Gerrymandering*, 8 Q.J. Pol. Sci. at 264; *see Vieth*, 541 U.S. at 309 (Kennedy, J., concurring).

Figure 2: Chen, *Unintentional Gerrymandering*, 8 Q.J. of Pol. Sci. at 246.

Chen's research shows (see Figure 3) that as the ratio of seats to voters in a legislative body increases, it becomes more difficult for the political party whose voters are geographically concentrated to maintain statewide vote parity.

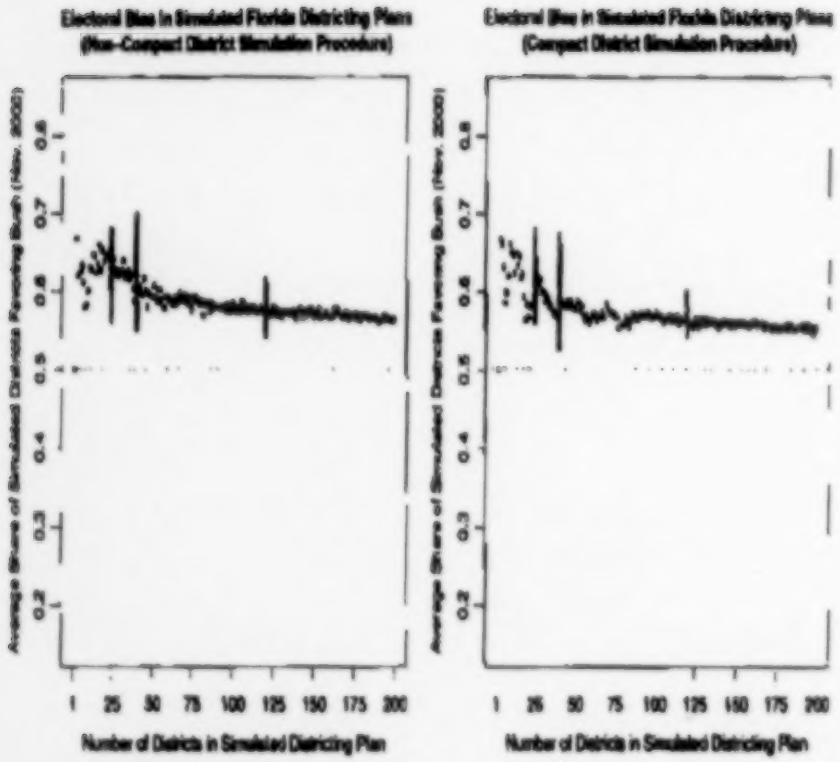

Figure 3: Chen, *Unintentional Gerrymandering,* 8 Q.J. of Pol. Sci. at 252 fig.4.

This is logical because as the size of the legislative body increases, meaning more legislative districts are added, the population required to comply with the one-person, one-vote requirement, in each district, necessarily decreases. As the required population decreases, the geographic reach of those districts also decreases in densely populated areas. For example, when the legislature of Florida divides the state into 120 districts, drawing contiguous and compact legislative seats in the Miami-Dade and Broward County areas necessarily results in districts that are overwhelmingly supportive of the Democrat Party's candidate. This is not "political gerrymandering" but is simply the

result of the residential clustering of voters supporting the Democratic Party's candidates.

Population density and voting patterns are highly correlated. Chen, *Unintentional Gerrymandering*, 8 Q.J. of Pol. Sci. at 243 fig.1. Higher population densities correlate with more votes for Democrats. *Id.* at 242.

Democratic voters are also, generally, more homogenous within a given geographical area. JA309a ("[For example], in 2012 President Obama won [Wisconsin's] Assembly District 16 with more than 90% of the vote and, not surprisingly, the incumbent Democratic candidate ran unopposed. There simply are no districts that have comparable margins for Republicans."); Chen, *Unintentional Gerrymandering*, 8 Q.J. of Pol. Sci. at 242-43 (while discussing the Bush-Gore presidential election in Florida "[B]ush received over 80% of the vote in only 80 precincts, Gore received over 80% [of the vote] in almost 800 precincts"). The EG does not adequately account for this phenomenon. *Whitford*, 180 F. Supp. 3d 583, No. 15-421 (W.D. Wis. Jan. 5, 2016) (Decl. of Trende, ¶ 148) (Dkt. No. 55). Large shifts in the EG do not necessarily correspond to redistricting years. *Id.* at ¶ 130, reinforcing that the EG is partly a reflection of political geography and not partisan gerrymandering. *Id.* at ¶ 130-31.

B. Appellees' "Efficiency Gap" Is Biased Towards Democrats And Is Likely To Cause Constitutional Conflict With Section Two Of The Voting Rights Act.

Adopting the "efficiency gap" test may create a conflict with districting plans ordered to create majority-minority districts to remedy violations of Section 2 of the Voting Rights Act. In other words, the creation of majority-minority districts has the potential to cause "efficiency gap" "constitutional questions" for Section 2 remedial plans. *See, e.g.*, *Garza v. Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (affirming district court ruling that a district required a Hispanic voting majority); *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002) (finding majority-minority or near majority-minority district required under Section 2 in court drawn plan); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010) (adopting a remedial plan with a majority of Hispanic Citizen Voting Age Population (CVAP) in an electoral district).

In addition to the EG causing a potential conflict between the Constitution and Section 2, the EG could also render unconstitutional plans drawn to acknowledge the geographic concentration of supporters of a political party found in *Easley v. Cromartie*, 532 U.S. 234 (2001), or motivated by bipartisan incumbency protection. *See Gaffney v. Cummings*, 412 U.S. 735 (1973). After all, "[a] bipartisan gerrymander employs the same

technique, and has the same effect on individual voters, as does a partisan gerrymander." *See Bandemer*, 478 U.S. at 154 (O'Connor, J., concurring).

An expert report by Professor M.V. Hood III filed in *Common Cause v. Rucho*, illustrates this concern. *Common Cause v. Rucho*, Nos. 16-1026, 16-1164, 2017 U.S. Dist. LEXIS 30242 (M.D.N.C. March 3, 2017) (denying motion to dismiss political gerrymandering claim).[6] Professor Hood's report was completed after the motion to dismiss was denied, and was not yet before the *Rucho* court when the March 3, 2017 order was issued.

Professor Hood proposes a hypothetical consisting of two redistricting plans each containing 60,000 voters evenly divided among ten districts. This hypothetical is depicted in the following three graphics.

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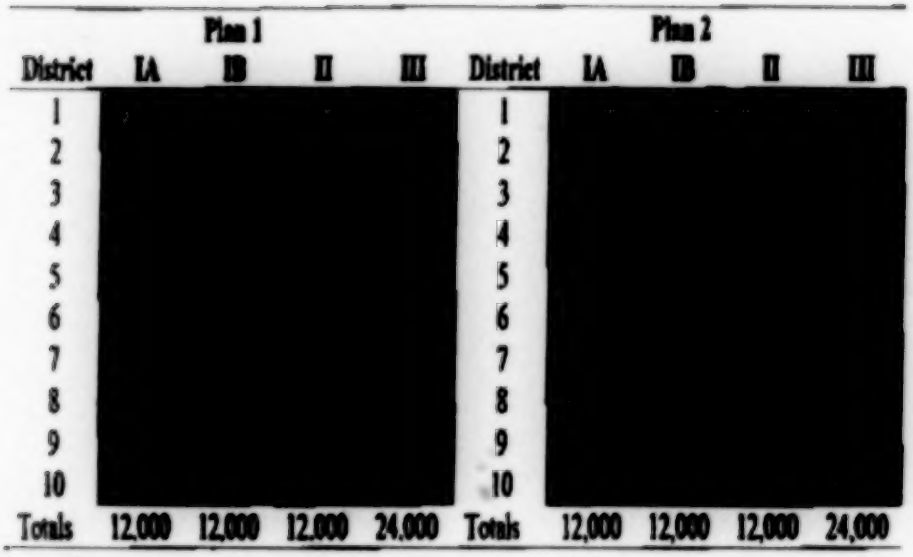
[6] Dr. Hood's report is *available at* http://www.hvjt.law/wp-content/uploads/2017/04/First-Rebuttal-Declaration-of-M-V-Hood-III-Expert-4-3-17-2.pdf (last accessed April 22, 2017.).



Plan 1					Plan 2				
District	IA	IB	II	III	District	IA	IB	II	III
1					1				
2					2				
3					3				
4					4				
5					5				
6					6				
7					7				
8					8				
9					9				
10					10				
Totals	12,000	12,000	12,000	24,000	Totals	12,000	12,000	12,000	24,000

Table 1: Id. at 16 tbl.5.

Dr. Hood states that Plan 1 is drawn to resemble North Carolina's redistricting maps from 1970, 1980, and 1990. *See* Hood Report at 20. Group IA, which can be viewed as a minority group, and Group IB represent two voting blocs that overwhelmingly support Party A. Group II overwhelmingly supports Party B and Group III is an independent voting bloc.

In Plan 1, Group IA is distributed evenly across six districts.

Plan 1			Plan 2		
Group III Vote for Party B	Party A Seats	Party B Seats	Group III Vote for Party B	Party A Seats	Party B Seats
49%			49%		
51%			51%		
55%			55%		
60%			60%		
65%			65%		
71%			71%		
75%			75%		
80%			80%		
85%			85%		
90%			90%		
95%			95%		
99%			99%		

Table 2: Id. at 17 tbl.6.

Table 2 demonstrates what happens as more of the independent vote (Group III) casts its votes for Party B instead of Party A under two hypotheticals. If Party A takes a majority of the independent vote, Party A will win all ten seats. However, as Party B receives a majority of the vote, a shift takes place under Plan 1. Party A is then reduced to 60% of the seats. But, no matter how high the independent vote is for Party B, it can win only 40% of the seats. *See* Hood Report at 17.

In Table 2's Plan 1, as Group III's votes shift from Party A to Party B, Party A loses seats. But even if Party B wins 99% of Group III's votes, Party A would still win 6 seats, representing a majority. *See id.* at 17.

Plan 2 resembles a Section 2 Voting Rights Act remedial plan. *Id.* at 17, 20. Unlike the even distribution of Group IA in Plan 1, here, in Plan 2, Group IA is larger in districts 1 and 2, with the remainder distributed evenly across six districts. *See* Hood Report at 16. Hood then varies Group III's votes for Party A and B, leaving the remaining blocs constant. In contrast to Plan 1, Plan 2 is more volatile, providing a greater variety of results ranging from Party A winning all 10 seats to Party A winning only 2 seats. *See id.*

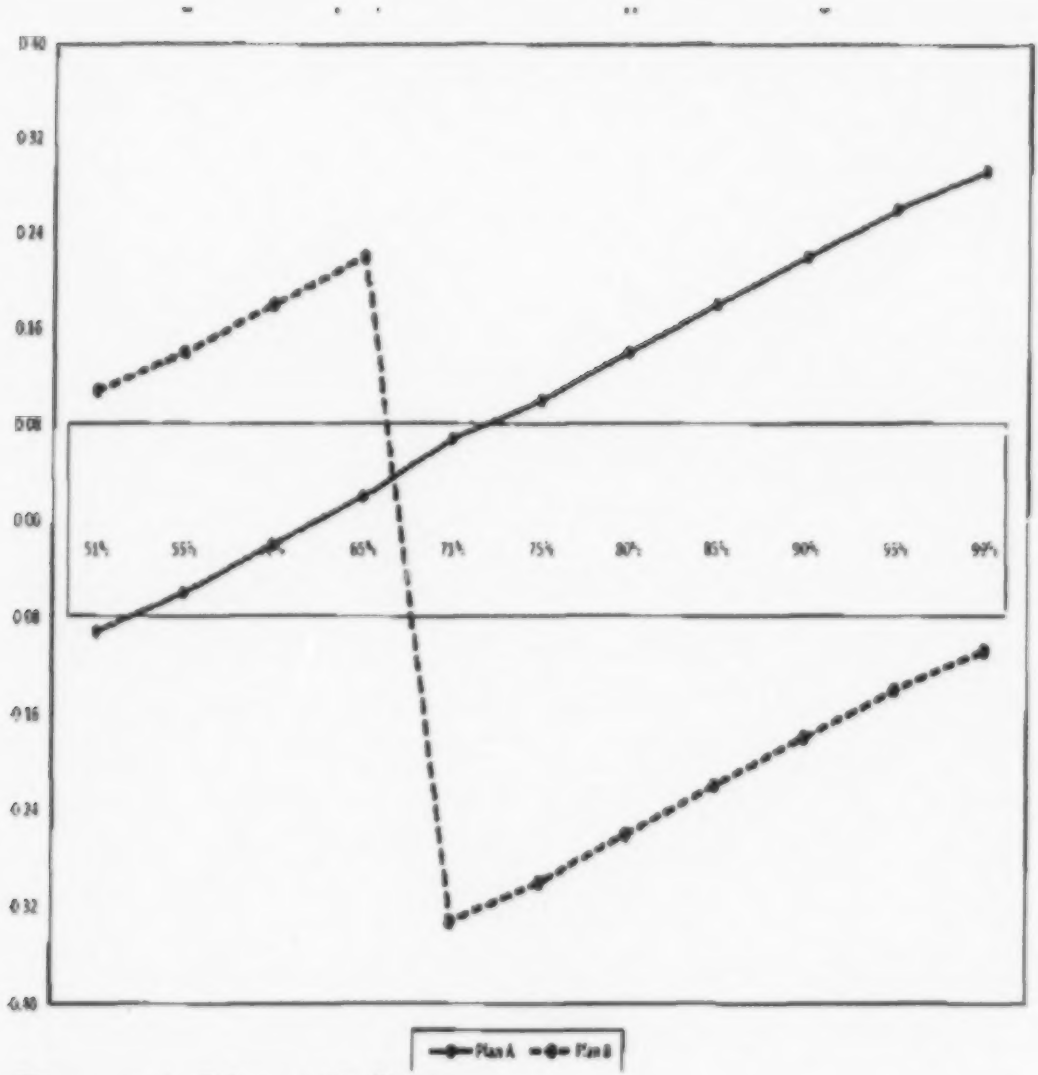


Figure 4: Id. at 19 fig.5.

Under Appellees' EG analysis, Plan 2 would consistently be declared an unconstitutional partisan gerrymander. *See id.* at 18. Conversely, Plan 1, under which Party B cannot win *any* additional seats even when Party B takes 99% of Group III's votes, Appellees' EG only occasionally condemns Plan 1, and only in the most extreme of circumstances. Stated differently, Plan 1 is a virtually unbreakable political gerrymander on what

is similar to a racial vote dilution. Yet Plan 1 escapes the sensitive shoals of Appellees' EG.

Plan 2 is always described as a gerrymander even though it provides multiple variations in seat distribution. Furthermore, Plan 2 is capable of exhibiting what Justice O'Connor described as the self-correcting nature of political gerrymanders. *See id.*; *see Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring) (noting that there was no proof that partisan gerrymandering is an evil that the vast resources of the major political parties could not check and correct);[7] *Vieth*, 541 U.S. at 287 n.8 (noting that, despite an alleged gerrymander that allegedly deprived Republican judicial candidates electoral victories, every Republican judicial candidate won their election after district court ruled in plaintiffs' favor causing the Fourth Circuit to reverse and remand for reconsideration).

Hood's hypotheticals reveal an underlying bias in "efficiency gap" analysis. Appellees' standard disguises the typical Democrat political gerrymander (Plan 1) while falsely labeling Voting Rights Act remedial plans as political gerrymanders. *See Vieth*, 541 U.S. at 308-09 (Kennedy, J., concurring); *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (exhorting that courts should not enter the "political

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[7] Justice O'Connor's prediction was prescient because four years after *Bandemer*, under the same map, the Democrats won a majority in the state House. Election History for INDIANA, Polidata.org, http://www.polidata.us/books/in/pub/inehcxc1.pdf (last visited April 13, 2017).

thicket" of redistricting). As a result, the "efficiency gap" is a defective and deficient standard for determining an equal protection violation.

C. This Case Demonstrates Why Appellees' "Efficiency Gap" Is Deficient.

These effects are well illustrated here in this case. The inefficient clustering of Democratic votes results in more Republican districts than one would expect if there were an even distribution of all voters across a geographic area. Goedert, *Gerrymandering or Geography*, Res. and Pol. at 3 ("[W]e observe bias even where we should expect none in the redistricting process. Democrats . . .fell short of expectations in several states with bipartisan or court-drawn maps.").

The Appellants' expert below explained this phenomenon. *See Whitford*, No. 15-421 (Decl. of Trende, ¶¶ 130-31 (Dkt. No. 55)). Trende identified 17 states as having an "unambiguous history" of a high EG over the life of that state's plan. *See infra* Table 3. However, of the 17, only seven had legislatures where a single political party controlled both chambers when the map was drawn. *See id. Whitford*, No. 15-421 (Decl. of Trende, ¶ 110) (Dkt. No. 55). Additionally, "[i]n five of those seven instances . . . , control of at least one of the maps that produced unambiguous histories of consistent "efficiency gaps" switched partisan hands at least once." *Id.* Furthermore,

> [E]fficiency gaps are growing in ways that gerrymandering has difficulty

> explaining, and are present in maps drawn by courts, by independent commissions, and by members of the opposing party. The EG would indicate partisan intent, or, in the view of the majority below, be evidence of such. This would occur even in situations in which one party political gerrymandering would be impossible.

Id. at ¶ 131. In other words, the use of the EG as a tool to identify partisanship is, at best, misleading.

Table 1: Partisan Control of Redistricting. Maps Id'd With "Unambiguous EGs"

State	Year	Gov	House	Sen
FL	2002	R	R	R
CA	1992	R	D	D
CO	1982	D	R	R
CO	1972	R	R	R
IL	1992	R	D	D
MI	2002	R	R	R
MI	1992	R	R	D
MO	2002	D	D	R
NY	2002	R	R	D
NY	1992	D	R	D
NY	1972	R	R	R
NY	1982	D	R	D
OH	2002	R	R	R
OH	1994	R	R	D
PA	1982	R	R	R
WI	2002	R	D	R
FL	1972	D	D	D

Table 3: Id. at ¶ 109 tbl.1.

Researchers have created computer models to develop more proportional districts, and the results almost always favor Republicans due to political geography's favoring the Republican Party. Chen, *Unintentional Gerrymandering*, 8 Q.J. of Pol. Sci. at 252-53 (using Florida as an example, a roughly 50-50 Republican-Democrat statewide vote split translates into an average of 61% Republican districts due to the effects of political geography); *see also* Goedert, *Gerrymandering or Geography*, Res. and Pol. at 1 ("[A] persistent pro-Republican bias is also present

when maps are drawn by courts or bipartisan agreement."). A study of Wisconsin found that the state's 2016 congressional redistricting plan was only 4% (or a third of a seat) more Republican than what the computer simulation said it should be. Chen, *Evaluating Partisan Gains*, 44 Electoral Stud. at 335-36. For much of the United States in general, and Wisconsin specifically, there is a natural clustering of votes that results in increased Republican representation over and above what statewide vote totals would suggest if seats were awarded in proportion to statewide votes.

II. The "Efficiency Gap" Requires Bizarrely Shaped Districts Of The Kind That This Court Previously Rejected.

In the racial gerrymandering cases, this Court has found equal protection violations when maps are drawn predominantly on the basis of race. Racial intent is typically evidenced by a map with bizarre shapes. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). To provide a "remedy" to the perceived "problem" of "political gerrymandering," drawing maps to accommodate the EG would result in bizarre shapes as a result of partisan voting patterns. Map-drawers would be forced to combine densely packed Democratic precincts with less densely packed precincts to achieve the sort of competitive districts that would satisfy the EG test.

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Figure 5: This is a map showing North Carolina District 12 which, "winds in a snakelike fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough . . . black neighborhoods.'" *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (declaring unconstitutional North Carolina map as a racial gerrymander); *but see Pope v. Blue*, 809 F. Supp. 392, 397 (W.D.N.C. 1992) (three-judge court) *sum. aff'd., Pope v. Blue*, 506 U.S. 801 (1992) (declaring that the same map is not a partisan gerrymander).

Appellees ask this Court to require maps that will, by necessity, look like the classic and familiar examples of gerrymandering. Appellees' remedy to the "problem" of "political gerrymandering" is the constitutionally mandated creation of competitive districts that will look as bizarre as those districts rejected by this Court and lower courts in racial gerrymandering cases.

This Court should not accept this invitation to further intervene into the political thicket. Rather, this Court should reject the notion that the judiciary should be called upon to solve one party's political geography dilemma.

III. Appellees Proposed Standard Is Based On The Flawed Assumption That The Constitution Requires Proportional Representation Of Political Parties In The Legislature Based On Statewide Vote Totals.

The term "efficiency" is a comparative one. As the dissent below demonstrates, the "efficiency gap" test is premised on "comparing legislative seats to statewide votes...." JA270a. Thus, if a party wins 60% of the statewide vote but wins only 51% of the assembly seats, there is a large "efficiency gap." *Id.* The "efficiency gap" test is also an improper tool for assessment because it measures all of the votes received by candidates from the 99 districts in Wisconsin and from that determines how many seats that party "should" win. JA277a.

Thus, the test is concerned with how many seats a party "should" win if there were in fact an even statewide distribution of voters with one preference or another as opposed to capturing the individual nature of each district's election as a contest between two candidates. *Id.* Thus, disproportionality "is simply a side-effect of [a State's] decision" to have winner-take-all districts because only one party will represent a whole district that may contain 49% of one party's voters

and 51% of another party's voters. JA279a; *see also Bandemer*, 478 U.S. at 130. Appellees' test, therefore, presumes that proportionality of representation in legislative bodies based on statewide votes is the "norm" against which "efficiency" is being measured. Appellees' "efficiency gap" is similar to the *Vieth* plaintiffs' "fairness principle" in that what plaintiffs there proposed "is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation." *See Vieth*, 541 U.S. at 308 (Kennedy, J., concurring). There is, however, "no authority for this precept." *Id.*

The "efficiency gap" is a poor test to adopt—as would be any test relying on measurements of partisan affiliation of districts—because partisan affiliation is an inherently mutable classification. *See Bandemer*, 478 U.S. at 156 (O'Connor, J., concurring). Voters often change political party preference, voting for a candidate from one party in one election and voting for another candidate from another political party in the next election. *See id.* This difficulty of measuring partisan affiliation makes court intervention more tenuous. *See id.* By contrast, race is immutable. *See id.*

The "efficiency gap" views political power through the myopic lens of the ability to win elections and control the majority of seats in a legislative body. But this Court rejected that view in *Bandemer*, concluding that "the power to influence the political process is not limited to winning elections." *Bandemer*, 478 U.S. at 132. Even those who voted for the losing candidate maintain the

ability to influence legislation and to adequate representation by the winning candidate. *See id.* The "efficiency gap" fails to account for this ability to influence the political process.

The "efficiency gap" is simply a tool for determining how many seats political parties "should" receive based upon the premise that statewide proportional representation is the constitutionally required norm. Adopting the proposed test would fulfill Justice O'Connor's prophecy that courts, in response to partisan gerrymandering claims will depart from the bedrock principle of no proportional representation, "toward some form of rough proportional representation for all political groups." *Bandemer*, 478 U.S. at 145; *Vieth*, 541 U.S. at 282.

Our constitution eschews mandating proportional representation because in each election, especially legislative elections, "voters cast votes for candidates in their districts, not for a statewide slate of legislative candidates put forward by the parties. Consequently, efforts to determine party voting strength presuppose a norm that does not exist...." *Bandemer*, 478 U.S. at 159 (O'Connor, J., concurring).

Justice O'Connor rightly warned that the use of proportional representation as evidence of partisan gerrymandering will inevitably lead to a constitutional right of *some* proportionality. *See id.* at 157. Adopting the appellees' test will–as Justice O'Connor warned–lead to a constitutional right to *some* degree of proportional representation. *See id.*

While the EG standard may not produce perfect proportionality, it is premised on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Id.* at 159. Accordingly, the Appellees' test also presumes a constitutional right to proportional representation.

CONCLUSION

Appellees do not present a new comprehensive test to impartially evaluate partisan gerrymandering claims. This Court should note probable jurisdiction, or summarily reverse, to correct the district court's error.

Respectfully submitted,

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